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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1985

HACKNEY, INC., AND WAYNE SCHWEDLAND,

Petitioners,

v.

WILLIAM H. BROCK, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a civil contempt proceeding, are an employer's Fourth and Fifth Amendment rights violated, contrary to the Supreme Court's holding in *Marshall v. Barlow's*, by denying an employer the right to seek a declaratory judgment as to whether OSHA's administrative general inspection plan is unconstitutional?

2. Are an employer's Fourth Amendment rights violated by applying the Supreme Court's holding in the criminal case of *Franks v. Delaware* to determine whether probable cause has been established to issue an OSHA civil administrative search warrant authorizing a general inspection?

PARTIES TO PROCEEDING IN COURT BELOW

In this proceeding, HACKNEY, INC., a division of Trinity Industries, Inc., and WAYNE SCHWEDLAND are Petitioners. WILLIAM H. BROCK, current Secretary of Labor has been substituted as Respondent in place of Raymond J. Donovan.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, HACKNEY, INC., and WAYNE SCHWEDLAND, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 30, 1985.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals (*see*, App. *infra*) is reported at 769 F. 2d 650. The opinion of the United States District Court for the Western District of Oklahoma is reported at 583 F. Supp. 773. (*see*, App. *infra*)

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was rendered on July 30, 1985. A timely Petition for Rehearing was denied on August 23, 1985. On September 27, 1985, Hackney's Motion for a Stay of Mandate Pending Petition for Certiorari was granted. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment, United States Constitution, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, United States Code, Section 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, Section 2201(a), Creation of Remedy, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rules of Civil Procedure, Rule 26(b)(1), paragraph 1, provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissiable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT OF THE CASE

On January 28, 1982, an Occupational Safety and Health Administration ("OSHA") compliance officer appeared at Hackney, Inc.'s plant in Enid, Oklahoma, and stated that he

was there to conduct a health inspection of Hackney's premises. No complaint or evidence that any violations existed in Hackney's plant were presented by the compliance officer. Rather, he indicated that the investigation was a programmed or "general schedule" inspection to be conducted of Hackney's entire premises.[1] Since the requested inspection would have constituted Hackney's seventh inspection in some form by OSHA in less than six years, Hackney requested a valid search warrant as a prerequisite to a search of its premises.[2]

On March 30, 1982, OSHA made an Ex Parte Application to the United States Magistrate in Oklahoma City for a warrant to conduct a general inspection of Hackney's premises. The only alleged probable cause for such warrant was OSHA's so-called "plan" for conducting general, programmed inspections. The Magistrate issued the warrant on March 30 and OSHA returned and served the warrant and a copy of the application for warrant materials on Hackney on March 31.[3] The application for warrant and affidavits reflected that Hackney had been selected for inspection on the basis of an erroneous standard industrial classification (SIC) code.[4]

Since Hackney did not wish to waive its constitutional rights, and desired a judicial hearing on these repeated OSHA inspections and the validity of the warrant and inspection plan, Hackney, pursuant to its counsel's advice, informed the compliance officer that it would not permit entry pursuant to what Hackney contended was an illegal

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[1]R. Vol. I, p. 3, Vol. III, p. 28, Vol. IV, Ex. 3.

[2]Affidavit in Support of Application for Search Warrant of James Brown, R. Vol. I, p. 69.

[3]R. Vol. I, p. 3, Vol. III, pp. 19-20.

[4]R. Vol. I, p. 69, Vol. III, pp. 61-64.

warrant.[5] The Secretary, on June 16, 1982, filed, in the United States District Court for the Western District of Oklahoma, a Petition for Adjudication in Civil Contempt against Hackney and its plant's manager, Wayne Schwedland.[6] Hackney immediately counterclaimed for a declaratory judgment that the warrant was invalid, and that OSHA's inspection plan was discriminatory, unreasonable, and provided for selective enforcement of the act in violation of the Fourth and Fifth Amendments to the United States Constitution.[7]

To support its counterclaim, Hackney requested the production of certain documents from OSHA and attempted to depose OSHA's supervisor, James Brown, regarding the design and application of OSHA's inspection plan. The District Court, however, denied Hackney full discovery[8] and declined to certify the discovery questions raised thereby.[9]

Trial on the merits of the Secretary's contempt action and Hackney's declaratory judgment action was held on July 28, 1983. OSHA's supervisor Brown admitted under cross examination that he had only four inspectors to inspect approximately 150,000 businesses; that many businesses had never been inspected at all; that OSHA had attempted to inspect Hackney for the seventh time in six years because Hackney was "on the list" from the national office; that the national office purchased the list of companies to be inspected from Dun & Bradstreet; that as long as Hackney

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[5]R. Vol. III, p. 20.

[6]The basis of federal jurisdiction over the Secretary's Complaint in the District Court was 28 U.S.C. §§ 636 (e), 1337 (a), and 1345.

[7]The basis of federal jurisdiction over Hackney's counterclaim in the District Court was 28 U.S.C. §§ 1331 and 2201 and F. R. Civ. P. 57.

[8]R. Vol. I, p. 261.

[9]R. Vol. II, p. 13.

was "on the list" they should prepare to be reinspected regularly; and that more than 99% of the other businesses in Oklahoma, including many of Hackney's competitors, are *de facto* exempted from programmed OSHA inspections.[10] Evidence adduced at trial further established that Hackney had been selected for inspection, based on an erroneous and inaccurate standard industrial classification or "SIC" code.[11]

In its March 23, 1984, Memorandum Opinion, the trial court, in reliance on *Franks v. Delaware*,[12] stated it would disregard the evidence as to the unreasonable and discriminatory nature of OSHA's inspection plan in reviewing whether the Secretary had established probable cause for issuance of the warrant because such evidence was beyond the "four corners" of the warrant application. The District Court declined to rule on the Fourth and Fifth Amendment challenges to OSHA's inspection plan, dismissed Hackney's Counterclaim "without prejudice" and held Hackney and Plant Manager Schwedland in civil contempt for failure to honor the warrant. The trial court, by failing to address the fact that Hackney was classified in the wrong SIC group, in effect, also found the Secretary's error to be irrelevant because there was no showing that the erroneous SIC classification was intentional or reckless.

The District Court, on April 6, 1984, entered a formal civil contempt judgment and ordered Hackney to submit to the inspection. Hackney and Schwedland promptly gave notice of appeal and moved the trial court to stay its judgment pending such appeal. By Order of April 13, 1984, the trial court granted the Application for Stay.

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[10]R. Vol. III, pp. 26-40.
[11]R. Vol. I, p. 69, Vol. III, pp. 61-64.
[12]438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

Hackney appealed to the United States Court of Appeals for the Tenth Circuit. On July 30, 1985, the Court of Appeals affirmed the trial court in ruling that "probable cause" for issuance of the warrant had been shown. The Court of Appeals also ruled that the trial court committed no error in barring pretrial discovery and trial testimony outside the four corners of the material submitted to the issuing federal Magistrate — whether relevant to Hackney's declaratory judgment action or to its challenge to the warrant. A timely petition for rehearing was denied on August 23, 1985. On September 27, 1985, Hackney's Motion for Stay of Mandate Pending Petition for Certiorari was granted.

REASONS THE WRIT SHOULD BE GRANTED

PRELIMINARY STATEMENT

This Court's decision in *Marshall v. Barlow's Inc.*,[13] confirmed that the Occupational Safety and Health Administration (OSHA) must obtain a search warrant before conducting a nonconsensual inspection. In that opinion, this Court not only held "that Barlow's was entitled to a declaratory judgment that the act[14] is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent . . . " but also established the standards for establishing administrative probable cause.[15]

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[13]436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978).

[14]Id. at 325.

[15]"Probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that 'reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment].' " 436 U.S. at 320 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967)).

Since that decision, numerous state[16] and federal[17] courts have wrestled with whether an employer may seek a declaratory judgment determining whether OSHA's administrative general inspection scheduling plan is unconstitutional, as well as what evidence establishes administrative probable cause and whether the latter inquiry is limited by the application of *Franks v. Delaware*.[18] From these decisions, and others discussed specifically, *infra*, has emerged a conflict over whether the limitations of *Franks v. Delaware*, though criminal, should be applied in determining if civil administrative probable cause has been established for issuance of a general inspection warrant.

Courts electing to embrace *Franks v. Delaware* in a civil context have refused to allow prosecution of a civil declaratory judgment action, filed as a counterclaim in a civil contempt proceeding, which challenges not only the search warrant sought *instanta* by OSHA, but also the constitutionality of OSHA's underlying inspection plan. The decision below, and others like it, denies the Fourth Amendment rights of an estimated six million employers by endorsing an administrative search warrant which sus-

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[16]*See Mosher Steel - Virginia v. Eva S. Teig, Commissioner of Labor*, 327 S. E. 2d 87, 12 BNA OSHC 1217 (Va. 1985); *Collier Sawmill v. Williams, Commissioner of Labor*, 1984 CCH OSHD ¶26,798 (Ind. Cir. Ct., 1983); *In the Matter of the Occupational Health and Safety Inspection of Custom-wood Manufacturing Company*, 1983 CCH OSHD ¶26,586 (N.M. Dist. Ct., 1983); *Gooden v. Brooks*, 251 S. E. 2d 919 (N.C. App. 1979).

[17]*See Brock v. Gretna Machine and Ironworks*, 769 F. 2d 1110 (5th Cir. 1985); *Donovan v. Mosher Steel Company*, 11 BNA OSHC 1966 (N.D. Ala. 1984), *appeal pending*; *Donovan v. Athenian Marble Corp.*, 535 F. Supp. 176 (W.D. Okla. 1982).

[18]436 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

piciously resembles the general warrant feared by both the framers[19] and this Court.[20]

In the same manner, courts have dismissed civil declaratory judgment actions filed to challenge the constitutionality of the OSHA general administrative inspection plan on the grounds that such suits go beyond the scope of *Franks v. Delaware*. In effect, these decisions suspend the Federal Rules of Civil Procedure in this narrow area, while depriving the employer of his due process right to challenge the constitutionality of the OSHA general administrative inspection program, in addition to the warrant itself. These cases, when read in conjunction with *United States Department of Labor v. Kast Metals Corp.*, foreclose all inquiry whatsoever into the OSHA general administrative inspection plan.[21] Hackney urges these decisions prevent, rather than permit, the courts to make the constitutionally required determination whether "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied

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[19]T. Taylor, *Two Studies in Constitutional Interpretation* 41 (1969); 2 *Legal Papers of John Adams*, 106-147 (Wroth and Zobel, *ed.* 1965); 10 John Adams, *Works*, at 247; Article XIV, Massachusetts Constitution of 1780; Article X, Virginia Declaration of Right, 1776 ("General warrants . . . are grievous and oppressive and ought not to be granted.").

[20]*Marshall v. Barlow's, Inc.*, *supra*, 436 U.S. at 311, 323; *Harris v. United States*, 331 U.S. 145, 157-162, 91 L. Ed. 1399, 67 S. Ct. 1098 (1947) (Frankfurter, J., dissenting), majority opinion overruled, *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969).

[21]In *United States Department of Labor v. Kast Metals Corp.*, 744 F. 2d 1145, 1153-54 (5th Cir. 1984), the Fifth Circuit held that the OSHA general administrative inspection plan could be promulgated without the notice and comment required by the Administrative Procedure Act, 5 U.S.C. §553, because the plan did not have a "substantial impact" on the six million employers subject to inspections pursuant to the inspection plan. The *Kast Metals* court specifically stated that its decision was premised on the fact that the employer's Fourth Amendment interests should be protected by the issuing magistrate and the federal courts. *Kast Metals*, *supra*, at 1155.

with respect to a particular [establishment]." *Marshall v. Barlow's, Inc.*[22]

1. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF ANOTHER COURT OF APPEALS, A STATE COURT OF LAST RESORT, AND THE SUPREME COURT BY DENYING AN EMPLOYER THE RIGHT TO SEEK A DECLARATORY JUDGMENT AS TO WHETHER OSHA'S ADMINISTRATIVE GENERAL INSPECTION PLAN IS UNCONSTITUTIONAL.

In light of this Court's holding in *Barlow's*, awarding a declaratory judgment that a portion of OSHA's statutory scheme was unconstitutional,[23] it would seem well established that a counterclaim requesting a declaratory judgment that the OSHA general administrative inspection plan is unconstitutional would be permissible in response to a petition for adjudication in civil contempt.[24] The Court of Appeals for the Tenth Circuit, in conflict with that procedure, dismissed Hackney's counterclaim for declaratory relief, ruling it was only an attempt to "go behind" the evidentiary matter presented to the federal magistrate in seeking the warrant. In so doing, the Court of Appeals affirmed the District Court's refusal to permit Hackney to "challenge the plan in the manner sought in the contempt proceeding."[25] In treating Hackney's declaratory judgment action as

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[22]436 U.S. at 320, (quoting *Camara v. Municipal Court*, 387 U.S. at 538 (1967).

[23]436 U.S. at 325.

[24]As with the case *sub judice*, the government in *Barlow's* requested the employer be ordered to show cause why he should not be held in civil contempt for refusing to honor the inspection order. 436 U.S. at 315, n. 8.

[25]Hackney's only means to attack the constitutionality of the OSHA's inspection plan was by counterclaim in the contempt proceeding. The law is well settled that apart from a warrant enforcement proceeding, an employer's constitutional challenge to the OSHA inspection plan fails to

nothing more than a challenge to the warrant, the Court of Appeals ignores the fact that the OSHA general inspection plan itself, and not just the warrant, is being challenged. The Court of Appeals' application of *Franks v. Delaware*,[26] and its own decision in *Marshall v. Horn Seed Company*,[27] not only limits the employer's warrant inquiry but also denies an employer's right to bring a civil declaratory judgment action which extends beyond such inquiry.[28]

In addition to the conflict in principle that the Tenth Circuit's ruling has with *Barlow's*, the appealed decision stands in direct conflict with *Mosher Steel-Virginia v. Eva S. Teig, Commissioner*.[29] There, the Virginia Supreme Court, with Justice Cochran writing for the majority, held that an employer who challenges the plan on which a general inspection warrant is based is entitled to seek a pre-search declaratory judgment to determine the constitutional validity of the plan.[30]

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state a justiciable controversy. *See Baldwin Metals Company v. Donovan*, 642 F. 2d 768, 774, n. 13 (5th Cir., 1981); *Donovan v. Mosher Steel Co., supra*, 11 BNA OSHC at 1966; *Mosher Steel - Virginia v. Teig, supra*, 327 S. E. 2d at 91-91. Thus, Hackney's counterclaim for a declaratory judgment in a civil contempt proceeding constituted the only possible vehicle for an employer to contest the constitutionality of OSHA's administrative inspection plan while preserving its Fourth Amendment rights

[26]438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

[27]647 F. 2d 96 (10th Cir. 1981).

[28]*Frank v. Delaware* involved a criminal warrant and should be inapplicable here, as set forth *infra*, at pages 14-16. *Horn Seed* similarly involved an OSHA inspection warrant issued pursuant to a specific employee complaint, and is much more analogous to the criminal warrant discussed in *Franks, infra*, at pages 14-15. Both *Franks* and *Horn Seed* are inapposite to the inspection warrant at issue here, where no allegations of any specific violations by Hackney have been made. *See Gretna, supra*, 769 F. 2d at 1112.

[29]327 S. E. 2d 87 (Va. 1985).

[30]The Virginia Supreme Court, in allowing the employer's declaratory judgment action to proceed, also held the employer was not required to make a *Franks* showing to contest either the validity of the warrant and/or its underlying plan for a general inspection. The Court further noted

Brock v. Gretna Machine & Ironworks, Inc.,[31] by the breadth of its inquiry, contemplates that an employer is entitled to bring a civil declaratory judgment action and discover facts relating to the operation and application of the Secretary of Labor's plan for programmed general inspections.[32] The Court of Appeals for the Fifth Circuit discussed generally the procedure to be followed when an employer challenges the administrative inspection plan underlying a warrant. The Court of Appeals' discussion of this procedure reveals that the employer is entitled to discovery and pursuit of his claim once the employer challenges the reasonableness of the plan or program by filing a declaratory judgment action:

> "The magistrate, and the district court upon challenge, must determine whether the Secretary has prepared a reasonable inspection program and, if so, whether the desired inspection fits within that program. The judicial function is a dual one. It is first encumbent upon the court to review the plan itself to ensure that it contains the specific neutral criteria mandated by *Barlow's*. The court must do so in order to 'balanc[e] the need to search against the invasion which the search entails.' Factored in, and occasioning a certain heightening of review is the inherent difference between a programmed inspection and one based on an employee's complaint asserting the existence of a violation. In the latter instance, the eye witness complaint, if reliable, provides some assurance that work place hazards proscribed by Congress exist. In the former

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that the lack of imminent danger and urgency, the lack of a specific complaint, and the fear of a revived general warrant — when coupled with the overriding importance of the Fourth Amendment — justified any possible delay in enforcement which might result. 327 S. E. 2d at 92, 93.

[31]769 F. 2d 1110 (5th Cir. 1985).

[32]It should be noted that the Court in *Gretna* found it unnecessary to consider the reasonableness of the underlying inspection plan (and hence to consider the discovery of sanctions imposed by the District Court on the Secretary therein), because the OSHA warrant and application on their face were defective. 769 F. 2d at 1112.

> instance, the plan itself provides the only evidence to be weighed against the employer's privacy interests. The court must guard against arbitrariness. A review of the plan itself is required to accomplish this function. The second and co-equally important function of the court is the determination that the particular establishment was appropriately selected under the plan. This requires a consideration of the plan's industry rank list for the state in question and the methodology used in the selection of the particular establishment. The court should also be informed of the Secretary's perception of the desired frequency of inspections of companies on the inspection list and the actual inspection history of the business in question." 769 F. 2d at 1112 (citations and footnote omitted).

The determination of reasonableness referred to above by the Court of Appeals for the Fifth Circuit cannot be made without exploring various provisions of the plan which are not clear on their face by means of a civil declaratory judgment action. Discovery is required both to examine and to evaluate the warrant application and various provisions of the inspection plan. *Hackney* and *Gretna* are in flat disagreement on this right of the employer.

2. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF ANOTHER COURT OF APPEALS AND A STATE COURT OF LAST RESORT ON AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, CONCERNING THE LIMITATION OF AN EMPLOYER'S FOURTH AMENDMENT RIGHTS BY APPLYING *FRANKS V. DELAWARE* IN A CIVIL ACTION.

In *Barlow's*, this Court established that a civil administrative warrant will survive constitutional challenge if it is

issued pursuant to an administrative plan derived from neutral sources and the warrant application adequately explains why an inspection of the particular establishment is within the program.[33] The Court of Appeals below, noting the substantial deference to which the magistrate's finding of probable cause is entitled, held that administrative probable cause had been established and that Hackney was randomly selected for inspection pursuant to a neutral inspection plan.[34]

The opinion below, and *Gretna*, are both in conflict with *Mosher Steel-Virginia v. Eva S. Teig, Commissioner*,[35] on the issue of whether the limitations of *Franks v. Delaware* should be applied to a Court's required determination whether probable cause exists for issuance of a civil administrative search warrant based on a general inspection plan. In distinguishing a civil administrative warrant authorizing a general inspection in accordance with the plan from either a criminal warrant or a civil administrative warrant based

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[33]436 U.S. at 321, 323 n. 20. *See, also, Brock v. Gretna Machine & Ironworks, supra*, 769 F. 2d 1110 (5th Cir. 1985); and *Matter of Northwest Airlines, Inc.*, 587 F. 2d 12, 14, 15 (7th Cir. 1978).

[34]The Tenth Circuit opinion below is in direct conflict with *Gretna* on whether the materials furnished to the magistrate sufficiently explain why an inspection of Hackney is within the program. In *Gretna*, the Fifth Circuit noted that as a minimum the application must contain an accurate establishment list or a description of the procedure and how it was followed in the selection of an employer. *Gretna, supra*, at 1113. Here, the Secretary failed to establish or furnish the magistrate facts in support of OSHA's choice of SIC code used to select Hackney for inspection, OSHA's production of an establishment list in its entirety, and OSHA's admitted local additions or deletions to the establishment list. *Gretna, supra*, at 1113.

[35]327 S. E. 2d 87 (Va. 1985)

on affidavits alleging specific violations,[36] the Virginia Supreme Court summarized its reasons for rejecting the *Franks* limitations:

> "In the present case, there is no allegation in the affidavits of a specific violation or imminent danger. The affidavits merely support an application for a warrant authorizing a general inspection in accordance with a plan scheduled to determine whether there are violations of the Occupational Health and Safety Laws. There is no urgency requiring prompt execution of a warrant for such an exploratory search before the validity of the underlying plan is tested. A general inspection warrant comes uncomfortably close to being the kind of [general] warrant proscribed by the Virginia Bill of Rights . . ."[37]

There is no rational basis for applying a *Franks* criminal standard to restrict review of OSHA's general inspection plan herein. To the contrary, there are compelling reasons consistent with the spirit of *Barlow's* for not so doing. Investigative urgency or suggestion of imminent danger are not a part of the proceeding. There is no urgency requiring prompt execution of a warrant for such an exploratory search before the underlying plan is tested — as there might be in the case of a criminal proceeding or in the case of a safety and health complaint about existing unremedied conditions. To apply *Franks* in this setting is to suspend the Federal Rules of Civil Procedure, thus denying Hackney's due process rights. Furthermore, application of *Frank's* —

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[36] *Franks* was limited to whether a defendant in a criminal proceeding has the right to challenge the truthfulness of factual statements made in an affidavit supporting the warrant. 438 U.S. at 155. *West Point Pepperell, Inc. v. Donovan*, 689 F. 2d 950, 959 (11th Cir. 1982), along with *Marshall v. Horn Seed Company, Inc.*, 647 F. 2d 96 (10th Cir. 1981), have extended *Franks* to civil administrative warrants based on affidavits alleging specific violations.

[37] 327 S. E. 2d at 92.

when coupled with the dismissal of an employer's civil declaratory judgment action challenging the constitutionality of the plan — prevents any inquiry whatsoever to OSHA's or any other administrative agency's plan for the general scheduling of inspections.[38] The Court of Appeals' dismissal of Hackney's constitutional challenge to the OSHA general inspection plan in the contempt proceeding is particularly onerous, since courts have previously foreclosed challenge to the plan under the Administrative Procedure Act[39] and in declaratory judgment actions brought separately from warrant enforcement proceedings.[40]

Unlike a criminal warrant case, or even an administrative warrant based on a specific complaint, application of the *Franks* test precludes much more than just inquiry "behind" the warrant. It precludes any real adversarial challenge, inquiry, or judicial scrutiny into the constitutionality of a general administrative inspection plan which regularly subjects the Fourth Amendment and Fifth Amendment rights of some six million employers nationwide to the unbridled discretion[41] of OSHA.

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[38]In *Brock v. Mosher Steel Company and Roger Love*, No. 85-7210, currently pending in the United States Court of Appeals for the Eleventh Circuit, before Judges Tuttle, Godbold and Frank M. Johnson, Jr., the Secretary has taken the unequivocal position that in no way, should the reasonableness or neutrality of the creation or application of his plan be reviewed. A *Franks* application in that case would put an employer's constitutional rights entirely at the mercy of a magistrate's review of an affidavit based entirely on information and belief in an *ex parte* proceeding.

[39]*United States Department of Labor v. Kast Metals Corp.*, 744 F. 2d at 1153-54.

[40]*Baldwin Metals Company v. Donovan*, 642 F. 2d at 774, n. 13; *Donovan v. Mosher Steel Company*, 11 BNA OSHC at 1966; *Mosher Steel-Virginia v. Teig*, 327 S. E. 2d at 91-92. *See* note 25, *supra*.

[41]See, *Marshall v. Barlow's, Inc.*, 436 U.S. at 323; *see also*, note 20, *supra*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1985, three copies of this Petition for Writ of Certiorari were placed in the United States Mail, certified, return receipt requested, postage prepaid, to counsel for all parties required to be served, said parties being the Solicitor General, Department of Justice, Washington, D.C. 20530, and Andrea Casson, U.S. Department of Labor, Room S 4004, Washington, D.C. 20210.

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FILED
United States Court of Appeals
Tenth Circuit
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HOWARD K. PHILLIPS
CLERK

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RAYMOND J. DONOVAN,
Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

v.

HACKNEY, INC., and WAYNE SCHWEDLAND,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-82-871-R)

Robert E. Rader, Jr. of McCarty, Wilson, Rader & Mash; Ennis, Texas, Attorney for Defendants-Appellants.

Andrea C. Casson (Francis X. Lilly, Solicitor of Labor; Frank A. White, Associate Solicitor for Occupational Safety and Health; and Judith N. Macaluso, Assistant Counsel for Appellate Litigation; with her on the brief), U.S. Department of Labor, Washington, D.C., for Plaintiff-Appellee.

Before BARRETT and McWILLIAMS, Circuit Judges, and KERR, District Judge.*

McWILLIAMS, Circuit Judge.

*Honorable Ewing T. Kerr, United States District Judge for the District of Wyoming, sitting by designation.

A federal magistrate issued the Secretary of Labor a warrant authorizing a work-site inspection of Hackney, Inc. for possible violations of the Occupational Safety and Health Act, 29 U.S.C. §651, *et seq.* Hackney is located in Enid, Oklahoma and is engaged in the business of manufacturing welding fittings. However, the OSHA agent, armed with an inspection warrant, was denied entry to the plant by the plant manager, Wayne Schwedland, who was acting on instructions from Hackney's counsel. The Secretary then instituted the present proceeding by which it sought to hold Hackney and its plant manager in civil contempt. In the contempt proceeding, Hackney filed a counterclaim for a declaratory judgment that the inspection warrant was invalid because the warrant application failed to establish probable cause and because OSHA'S "general administrative plan" for scheduling programmed inspections of job sites was invalid on several grounds.

After trial, the district court held that there was probable cause for the issuance of the inspection warrant. Further, the district court refused to permit Hackney to challenge the "plan" in the manner sought in the contempt proceeding. Accordingly, the district court held both Hackney and Schwedland in contempt, ordering that Schwedland be committed to the custody of the United States Marshal and that Hackney pay a civil fine of $1,000 per day, until such time as they purged themselves of contempt. The district court's Memorandum Opinion appears as Donovan v. Hackney, Inc., 583 F. Supp. 773 (Colo. 1984). Hackney and Schwedland appeal.

The inspection warrant here involved was not based on specific evidence of an existing violation of the Act at the Hackney plant. Rather, in the instant case the request for an inspection warrant was made by Jack F. Ostrander, counsel for OSHA. Attached to the request was an affidavit of James E. Brown, III a Supervisory Industrial Hygienist for the Oklahoma City area OSHA office. In his affidavit, Brown stated, *inter alia*, that the purpose of the proposed inspection was to determine whether the conditions at Hackney's workplace were in compliance with Sections

5(a)(1) and 5(a)(2) of the Act, 29 U.S.C. § 654 (a)(1) and (a)(2), and the applicable regulations regarding health hazards, and that Hackney had been randomly selected for inspection through a programmed health inspection plan. Attached to Brown's affidavit were several supporting materials, including a copy of the plan. Based on this showing, the federal magistrate found "administrative probable cause" and issued the inspection warrant.

The initial question, in our view, is whether the federal magistrate acted on "probable cause" in issuing the warrant authorizing an inspection of the Hackney plant. If he did not, then, under Marshall v. Horn Seed Co., Inc., 647 F. 2d 96 (10th Cir. 1981), the district court in the present proceeding should have quashed the warrant and dismissed the contempt petition. However, unlike the district judge in *Horn Seed*, the district judge in the instant case held that the federal magistrate did act on probable cause, and we are disinclined to disturb such ruling.

As earlier stated, this is not a "specific evidence" case; i.e., OSHA is not acting, for example, on an employee's complaint that his employer is violating the Act. Both "specific evidence" and "programmed" OSHA inspections, however, are governed by a lower standard of "probable cause." As stated by the Supreme Court in Marshall v. Barlow's, Inc.:

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. *Probable cause in the criminal law sense is not required.* For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court,* 387 U.S., at 538. *A warrant showing that a specific business has been chosen for an OSHA*

> *search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources* such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, *would protect an employer's Fourth Amendment rights.* We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions. (emphasis added).

436 U.S. 307, 321-22 (1977)

In the instant case, the district court ruled that the federal magistrate acted on probable cause. Donovan v. Hackney, 583 F.2d 773, 778-79 (W.D. Okla. 1984). We agree that the material before the federal magistrate supports the district court's ruling that the magistrate acted with probable cause as it appears from our review of the warrant application that the Secretary's decision to inspect the Hackney plant was based on random selection under a programmed health inspection plan.[1] We have held that a magistrate's finding of probable cause in a criminal setting is entitled to substantial deference, United States v. Wood, 695 F.2d 459, 464 (10th Cir. 1982), and we now hold that such a rule is equally applicable in this case. The district court, in the instant case, carefully analyzed the materials before the federal magistrate and concluded that the magistrate had probable cause to issue an inspection warrant. We are in accord with the district court's handling of the probable cause issue. *See* 583 F. Supp. at 778-79. We note that the intrusion here is relatively minimal; this is an *inspection* of a *workplace* where employees freely enter, not a search of private residence. Not only is the intrusion minimal, but the bur-

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[1]Hackney's suggestion that it has been singled out for six plant inspections in six years does not stand up under closer scrutiny. Supporting material attached to Brown's affidavit shows that there was a programmed safety inspection in 1976, with two follow-up inspections, and a programmed health inspection in 1977, with two follow-up inspections, also in 1977, and no further inspections until the present proposed inspection in 1982.

dens on enforcement of the Act would be great if OSHA were not allowed to obtain an inspection warrant on the basis of a programatic plan. Thus, we hold that "administrative probable cause" is satisfied in the instant case, as Hackney was randomly selected for inspection pursuant to a neutral inspection plan.

Both in pretrial discovery and by proffered evidence upon the trial of this matter, Hackney sought to go "behind" the evidentiary matter presented to the federal magistrate. More specifically, Hackney sought to show that OSHA'S so-called "plan" was in the first instance improperly drawn, and thereafter improperly promulgated, and then improperly applied to Hackney, violating, *inter alia*, Hackney's Fourth and Fifth Amendment rights. The district court declined to permit such pretrial discovery and, at trial, ultimately rejected evidence which would go outside the "four corners" of the material submitted to the issuing federal magistrate. *See* Franks v. Delaware, 438 U.S. 154 (1978); Marshall v. Horn Seed Co., 647 F.2d 96 (10th Cir. 1981). On appeal, Hackney strenuously argues that the district court erred in thus restricting Hackney. We perceive no error.

In *Horn Seed*, we stated that "in [i]n ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge." 647 F.2d at 104. Hackney admittedly seeks a consideration of information which was *not* before the issuing magistrate. *Horn Seed*, in our view, precludes such efforts. We do not believe that Marshall V. Barlow's, Inc., 436 U.S. 307 (1977) envisions the expanded evidentiary inquiry here sought by Hackney in its efforts to resist an inspection of its plant; an inspection, incidentally, which is itself limited and subject to restrictions as set forth by the magistrate in his order. Rather, *Barlow's*, in our view, suggests that inspection warrants, which are required under that opinion, are to be issued *ex parte* and "executed without delay and without

prior notice . . ." 436 U.S. at 316.[2] We see no reason to impose cumbersome discovery procedures on the enforcement of an OSHA inspection warrant.[3]

On motion, the district court awarded the Secretary the sum of $5,705.12 for costs and expenses. The parties agreed to that sum as being "reasonable," although Hackney reserved the right to contest the award of any sum whatsoever. Hackney challenges the award thus made.

In its brief, Hackney concedes that an award of costs and expenses, including attorney fees, in a proceeding of this sort is a matter that rests within the discretion of the trial court, and that such an award may not be disturbed on appeal unless there be an abuse of such discretion. *See* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir.), *cert. denied*, 105 S. Ct. 176 (1984). We find no abuse of discretion. "Good Faith," assuming that Hackney had such, does not necessarily preclude an award of costs and expenses to the Secretary. Donovan v. Enterprise Foundry, Inc., 751 F.2d 30 (1st Cir. 1984). By choosing to refuse to comply with an inspection warrant and seeking a motion to quash, an employer runs the risk of being held in contempt and being assessed costs. Babcock and Wilcox Co. v. Marshall, 610 F.2d 1128, 1136 (3d Cir. 1979).

All judgments are affirmed.

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[2]We are here concerned with Hackney's pre-inspection rights, vis-a-vis, the inspection warrant, and, in our view of the matter, we are not concerned with any post-inspection rights Hackney may have. Also, we would note that in the context of a strictly criminal proceeding, any attack of the sufficiency of a search warrant almost invariably comes *after* the search, not before.

[3]United States v. New Orleans Public Service, Inc., 723 F.2d 422 (5th Cir. 1984), is, in our view, easily distinguishable. In that case, the General Services Administrator's field officer could select a company for inspection on his own; there was no "plan" as in the instant case. Thus, there was much greater discretion on the part of the agency, and the issue of how the company was selected became, in the Fifth Circuit's view, subject to more searching scrutiny. We also note that in *NOPSI* no warrant had been issued; thus, the posture of *NOPSI* differed from that in the instant case because no neutral magistrate had approved the method by which the business had been chosen for inspection.

FILED
March 23, 1984
Herbert T. Hope
Clerk, U.S. District Court
By Kathy Hess
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

Vs.

HACKNEY, INC., AND WAYNE SCHWEDLAND,
Defendants.

CIV 82-871-R

MEMORANDUM OPINION

This action was instituted by the Secretary of the United States Department of Labor, Occupational Safety and Health Administration (OSHA), upon its Petition for Adjudication in Contempt. The petition alleges that the Defendants, Hackney, Inc. and Hackney's plant manager, Wayne Schwedland, violated an order of this Court in refusing to allow an OSHA inspection after being served with a duly issued search warrant. The Defendants have counterclaimed for a declaratory judgment that OSHA's program for selection of establishments to be inspected is invalid as violative of the fourth and fifth amendments to the United States Constitution. The case was tried to the Court on July 28, 1983. The Court now issues this Opinion, which constitutes its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedures.

On January 26, 1982, OSHA Compliance Officer Landis Powell appeared at Hackney's plant in Enid, Oklahoma, to conduct a regularly programmed inspection of the premises. Plant manager Wayne Schwedland refused to allow that inspection, and on March 30, 1982, James Brown, III, a

Supervisor Industrial Hygienist with OSHA, appeared before Magistrate Paul Lindsey to obtain an administrative search warrant. The magistrate reviewed the affidavit of Brown and other attached materials and concluded that administrative probable cause had been established. The magistrate then issued the Inspection Warrant ordering Hackney's to permit the OSHA inspection.

Brown gave the warrant to Compliance Officer Heather Hartman, who appeared at the Enid plant at 8:30 A.M. the following day. Hartman presented her credentials and the inspection warrant to Schwedland, who asked her to wait while he called Hackney's attorney. Hartman waited in the lobby until 9:30, returning to Schwedland's office only to find that she would have longer to wait. At 11:00 she called Brown, who instructed here to stand by while Schwedland determined if the inspection would be permitted. Hartman waited through the lunch period, and again called Brown at 1:00 P.M. and at 2:30 P.M. At this point Brown spoke by telephone with Schwedland, advising the plant manager that Hartman was being sent to her next inspection location. Brown further requested that Schwedland advise him when Schwedland decided if the inspection would be allowed. Hartman left the plant at this time, never having conducted the ordered inspection. At some time after 4:00 P.M., Schwedland telephoned Brown to inform him that no inspection would be allowed.

Thus, the issue before the Court is whether Hackney and Schwedland should be adjudged in contempt of court for refusal to comply with the Inspection Warrant. However, the Defendants' counterclaim raises the preliminary issue of the scope of review to be used by the Court in determining the sufficiency of the warrant issued by the magistrate. This issue arose first in the context of pretrial discovery; OSHA resisted the Defendants' attempts to discover materials other than those presented to the magistrate with the warrant application. The Defendants filed a Motion to Compel, to which OSHA responded by filing a Motion for a Protective Order. The Court referred the dispute to Magistrate Lindsey, who heard argument and ultimately foreclosed dis-

covery on matters outside the warrant application. This order, issued September 3, 1982, was appealed to and affirmed by this Court on December 30, 1982. Thus, the Defendants were prevented from discovering materials alleged to support their counterclaim for declaratory judgment.

The issue was not yet resolved, however, as the Court permitted testimony at trial concerning matters other than those relevant to the warrant application. Now the Court must determine whether such evidence was properly admitted, and if so, whether Hackney and Schwedland can prevail on their counterclaim.

In *Marshall v. Barlow's* 436 U.S. 307 (1978), the United States Supreme Court put to rest the notion that administrative inspections could be forced upon an unwilling business without a search warrant. A problem not put to rest, however, was the question of what scope of review should be used to examine a magistrate's probable cause finding in administrative search cases. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court reaffirmed the position that review of a search warrant must be limited to examination of materials presented to the magistrate, in the absence of intentional or grossly negligent false statements made to the issuing magistrate. Although *Franks* involved warrant review in a criminal case, it is generally accepted that the same reasoning applies to administrative inspection warrants. *See, e.g., West Point-Pepperell, Inc. v. Donovan,* 689 F.2d 950, 959 (11th Cir. 1982); *Marshall v. Horn Seed Co., Inc.*, 647 F.2d 96, 100 (10th Cir. 1981). Thus, the traditional requirement that review of the warrant be confined to the "four corners" of the application is applicable to review of administrative inspection warrants.

The four corners requirement is often considered unsatisfactory in the administrative setting because it tends to preclude certain constitutional challenges during contempt proceedings. For example in *Marshall v. Barlow's*, the Supreme Court held that administrative probable cause could be established by showing that the selected workplace

had been chosen for the inspection on the basis of an administrative plan derived from neutral sources. 436 U.S. at 321. Thus, the plan itself plays a key role in review of the inspection warrant. However, certain aspects of the plan not considered by the issuing magistrate in his probable cause finding might make the plan subject to challenge despite the fact that probable cause otherwise exists. If applied by the reviewing court, the four corners requirement would prohibit review on those bases. It is this apparent "Catch 22" that is highlighted by the Defendants' counterclaim in this case; they seek to challenge the OSHA plan, CPL 2.25B, because it was allegedly improperly promulgated[1] and because it has an alleged discriminatory effect. Neither allegation is one which could have been considered by the magistrate in issuing the search warrant.

Thus, the question to be answered is how one may attack the validity of an OSHA selection plan, absent some indication of invalidity within the four corners of the warrant application. It would be gross understatement to say the courts have struggled in attempting to find a satisfactory answer to that question, but two basic methods have emerged. The more recent approach is that the party named in the inspection warrant refuses to permit the inspection and raises its challenges to the plan in contempt proceedings. Some courts have allowed parties in this posture to conduct discovery and present evidence outside the four-corners requirement for purposes of attacking the validity of the plan. *See, e.g., Donovan v. Athenian Marble Corp.*, 535 F. Supp. 176, 180 (W.D. Okla. 1982) (per Brett, J.). The obvious problem with this procedure is that it ignores the four corners requirement of warrant review. *See, e.g., Donovan v. Gretna Ironworks, Inc.*, No. CIV-82-1507 (E.D. La. Aug 24, 1983) (Magistrate's Order finding *Franks* inapplicable to the administrative search setting).

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[1]It was stipulated at trial that CPL 2.25B was not promulgated under the Administrative Procedures Act, 5 U.S.C. §553. The issue is whether the plan is a procedural rule, not subject to § 553, or a substantive rule, thus subject to the § 553 notice and comment requirements.

The second approach is that the named party allows the search and attacks the validity of the plan in subsequent citation proceedings before the OSHA Review Commission. This procedure has the advantage of allowing the concerned agency to rule on its own challenged regulation before recourse is taken to the federal courts. *See Parisi v. Davidson*, 405 U.S. 34, 37-8 (1972). After this administrative remedy is exhausted, federal appellate court review is available pursuant to 29 U.S.C. § 660 (1982). *Baldwin Metals Co., Inc. v. Donovan*, 642 F.2d 768 (5th Cir. 1981); *In Re Worksite Inspection of Quality Products, Inc.*, 592 F.2d 611 (1st Cir. 1979). The criticism of this approach is that although the procedure protects the aggrieved party from citations based on the invalid selection plan, it does not protect against the unreasonable search itself. *Weyerhauser Co. v. Marshall*, 592 F.2d 272, 276 (7th Cir. 1979); *Marshall v. Huffhines Steel Co.*, 488 F. Supp. 995, 997 (N.D. Tex. 1979), *aff'd* 645 F.2d 288 (5th Cir. 1981). For this reason, some courts find this procedure appropriate only where the allegedly unreasonable search has already taken place. *See, e.g., Baldwin Metals Co., Inc.*, 642 F.2d at 774 n. 13.

It is into this Sargasso Sea that the Court must navigate in determining the viability of the Defendants' counterclaim. The Defendants assert that the exclusive method to challenge the validity of the plan is to refuse to allow the inspection and present their case at these contempt proceedings. As has been mentioned above, this is not an exclusive remedy, but only one of two possible approaches. It devolves upon the Court to determine whether the procedure chosen by the Defendants is appropriate in the case at bar.

The Court concludes that the latter approach is preferable for purposes of the instant case. To adopt the pre-inspection approach would render the four corners

requirement meaningless in review of inspection warrants.[2] The Court cannot conclude that the Supreme Court imposed the warrant requirement on administrative searches only to abandon the four corners requirement, long an integral part of warrant jurisprudence. *See Aguilar v. Texas*, 378 U.S. 108 (1964). Such a position is unsupported by controlling case law and would further dilute the fourth amendment warrant requirement already weakened by application to administrative searches. *See See v. Seattle*, 387 U.S. 541, 547-8 (1967) (Clark, J., dissenting).

Further, the Tenth Circuit Court of Appeals has provided some guidance on which method of challenge is appropriate. In *Marshall v. Horn Seed Co., Inc.*, 647 F.2d 96, 100 (10th Cir. 1981), that Court determined that the four corners requirement applied to reveiw of inspection warrants. Although the Court was not considering a case involving a counterclaim, as in this case, neither did the Court use language indicating that such a case might be an exception to the rule. Indeed, in a case where the defendant chose the post-inspection approach to challenge the validity of the warrant, the Tenth Circuit showed its approval of administrative review by requiring the defendant to exhaust his administrative remedies in the OSHA Review Commission proceedings before invoking the power of the federal courts. *Robert K. Bell Enterprises, Inc. v. Donovan*, 710 F.2d 673, 675 (10th Civ. 1983). Thus, the Tenth Circuit seems to have indicated a preference for the post-inspection challenge.

The most formidable obstacle the Court must face in adopting a post-inspection challenge as the proper procedure in this case is the charge that such a procedure fails to protect the Defendants against a potentially unconstitutional search. If the Defendants are required to reserve their challenges to the plan for an OSHA Review Commission

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[2]It is interesting to note that, in his order denying the Defendants' Motion to Compel, Magistrate Lindsey characterized the Defendants' counterclaim as a "fishing expedition" designed for the purpose of avoiding the four corners requirement. With that statement the Court is inclined to agree.

hearing, they will obviously have to submit to the inspection. However, the Court concludes that the warrant application hearing conducted in this case is sufficient to protect the Defendants' fourth amendment interests. It is axiomatic that the instrusion occasioned by an administrative inspection is much less substantial than the intrusion occasioned by search of a private home, as the relaxed probable cause standard for inspection warrants indicates.[3] *See*, 387 U.S. at 545. Further, *Barlow's* is largely concerned with ensuring that inspections scheduled pursuant to a program are in fact "programmed", as distinguished from an arbitrary or harassing selection of a business for inspection. 436 U.S. 312; *Donovan v. Wollaston*, 695 F.2d 1, 5 (1st Cir. 1982). Thus, given the attenuated fourth amendment intrusion sought to be prevented, the Court can protect the Defendants adequately by reviewing the warrant on the same basis as did the magistrate, that basis being an assurance that OSHA's selection of Hackney for inspection was pursuant to a neutral plan. To provide further review would require the Court to set a higher standard than did the Supreme Court in *Barlow's*, and, given an intrusion that is decidedly less substantial than most intrusions protected by fourth amendment jurisprudence, the Court is unwilling to do so.

Because the Court concludes that a post-inspection challenge to the validity of OSHA's selection plan is preferable to the procedure used by the Defendants in this case, the Defendants' counterclaim is dismissed[4] without prejudice.[5]

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[3]The temptation to draw a parallel to the analogous criminal setting is irresistible. The victim of a criminal search warrant rarely, if ever, has an opportunity to challenge the validity of a search warrant before it is executed. It would be anomalous for the victim of the less intrusive commercial inspection to have a better right to challenge the warrant than the victim of the more intrusive search of a private home.

[4]Implicit in this order of dismissal are an affirmance of the Court's ruling limiting discovery and a determination that evidence outside the four corners of the warrant application should have been excluded. Accordingly, the Court will disregard the extraneous evidence in reviewing the sufficiency of the inspection warrant.

[5]The Court takes care to note that dismissal is without prejudice to preclude any dispute as to whether the Defendants' claims have been con-

The only remaining issue for the Court's consideration is whether the inspection warrant obtained by OSHA was issued upon probable cause.

Reviewing courts should show substantial deference to determinations of probable cause made by a magistrate. *Edmondson v. United States*, 402 F.2d 809, 813 (10th Cir. 1968). In passing on the magistrate's finding of probable cause, the reviewing court is required to limit its consideration to evidence presented to the magistrate to secure the inspection warrant. *West Point-Pepperell*, 689 F.2d at 959; *Horn Seed Co.*, 647 F.2d at 104. The one exception to this "four corners" rule occurs when the aggrieved party makes a preliminary showing that false evidence was presented to the magistrate, either intentionally or recklessly. *Franks*, 438 U.S. at 158.

The scope of review in this case must be confined to the materials presented at the warrant application hearing. Although at trial the Defendants attempted to make a *Franks* showing of false statement, they totally failed to show that any false statement, if in fact made, was made intentionally or recklessly.[6] Thus, the Court will review the magistrate's finding on the same evidence available to the magistrate, with proper deference given as noted in the above authorities.

OSHA submitted an affidavit by Brown and a copy of the selection plan, CPL 2.25B, for the magistrate's consideration. The affidavit gave, *inter alia*, Hackney's Standard Industrial Code, and explained how that code was relevant

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sidered on the merits. They have not, and it is left to future OSHA Review Commission proceedings, should they be necessary, to determine the Defendants' challenges to the validity of OSHA's selection plan.

[6]The Defendants attempted to show that a false statement was made when the magistrate was advised that Hackney belonged to Standard Industrial Classification (SIC) 3443. The Defendants' contention was that Hackney belonged to SIC 3498. Although Hackney's proof that it belongs in the latter group leaves something to be desired, that Court is satisfied that a lack of intent or recklessness disposes of the *Franks* issue.

to the selection plan. Based on these materials, the magistrate concluded that Hackney had been selected pursuant to CPL 2.25H, and that CPL 2.25B represented a general administrative plan for enforcement of OSHA regulations derived from neutral sources, as required by *Barlow's*. The magistrate then issued the warrant.

The Court is of the opinion that the inspection warrant was issued upon probable cause, and thus affirms the ruling of the magistrate. Without detailing the rather lengthy plan in this opinion, the Court concludes that CPL 2.25B is in fact a general administrative plan for the enforcement of OSHA regulations. The Court further finds that plan is derived from neutral sources; it is difficult to see how one following the plan could be deemed arbitrary. Further, given the testimony received at trial, the Court finds no reason to disturb the magistrate's finding that Hackney was selected pursuant to the plan. Brown's testimony at trial does not cast doubt upon the truth of his assertion in the affidavit.

The Court notes that similar presentations have been held to be sufficient to establish probable cause. In *Donovan v. Wollaston*, 695 F.2d 1 (1st Cir. 1982), the Court was particularly impressed by the inclusion of the selection plan in the warrant application. The Court concluded, as does this Court, that the plan negated any idea that the defendant had been selected arbitrarily. *Id.* at 5. Further, the Court held that the affidavit was sufficient to establish that the defendant was selected pursuant to the plan. *Id.* at 6.

As in this case, the defendant in *Wollaston* asserted that the affidavit should explicitly set out the computations used in executing the selection process. The *Wollaston* court rejected such a notion: "We do not see the magistrate as the Secretary's [the Secretary of Labor] auditor." 695 F.2d at 6. This Court is in agreement; as in *Wollaston*, it is enough in this case that the magistrate was persuaded that the enforcement personnel had followed the plan.

The Defendants' offer one final challenge to the warrant in that they assert it is too broad in scope. This claim focuses on the fact that the warrant permits use of personal

sampling devices. Although the Defendant did present some evidence that Hackney had forbidden use of personal sampling devices due to dangerous incidents involving their use, the Court is unpersuaded that it would be unreasonable to allow OSHA to inspect the plant by this method. The Court need only note that the use of personal sampling devices has heretofore been considered reasonable. *In Re Kast Metals Corp.*, 638 F.2d 42, 46 (8th Cir. 1981); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1102-03 (5th Cir. 1980).

Thus, it is the judgment of this Court that the inspection warrant was issued upon probable cause and was not overboard in scope. Refusal to allow the OSHA Compliance Officer to conduct an inspection of the Enid plant was therefore contempt of this Court. Defendants assert that Schwedland should not be found in contempt, as he merely performed a service for Hackney; however, the Court need only note the prominent role played by Schwedland in preventing the OSHA inspection to dismiss this contention. Accordingly, both Schwedland and Hackney are adjudged in contempt of court. The Court orders that Schwedland be committed to the custody of the United States marshal and that Hackney pay a civil fine of $1,000 per day, both beginning March 30, 1984 until the Defendants purge themselves of said contempt.

IT IS SO ORDERED this 23rd day of March, 1984.

/s/ DAVID L. RUSSELL
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

FILED
April 6, 1984
Herbert T. Hope
Clerk, U.S. District Court
By Nancy Estep
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

Vs.

HACKNEY, INC., AND WAYNE SCHWEDLAND,
Defendants.

CIV 82-871-R

JUDGMENT

This action having come on for trial before the court on July 28, 1983, and a memorandum opinion having been entered on March 23, 1984, it is therefore

ORDERED, ADJUDGED AND DECREED that Defendants Hackney, Inc. and Wayne Schwedland be, and they hereby are, adjudicated in civil contempt of this court; and it is further

ORDERED, ADJUDGED AND DECREED that they be, and they hereby are, required to purge themselves of their contempt of this court; and it is further

ORDERED, ADJUDGED AND DECREED that Defendant Hackney, Inc. pay a civil fine of $1,000 per day and that Defendant Wayne Schwedland be committed to the custody of the United States Marshall, both beginning at 1:00 p.m., Monday, April 16, 1984, until they purge themselves of their contempt of this court.

Signed this 6th day of April, 1984.

/s/ DAVID L. RUSSELL
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE
Entered in Judgment 4-6-84

UNITED STATES COURT OF APPEALS
For the Tenth Circuit

JULY TERM — August 23, 1985

Before Honorable James E. Barrett, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Ewing T. Kerr*

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

HACKNEY, INC. AND WAYNE SCHWEDLAND,
Defendants-Counterclaimants,
Appellants.

Nos. 84-1495
84-1568
85-1287

This matter comes on for consideration of appellants' motion for leave to substitute counsel and appellants' petition for rehearing, filed in the captioned cause.

Upon consideration whereof, appellants', Hackney, Inc. and Wayne Schwedland, motion for leave to substitute counsel is granted. Frederick W. Addison, III and Vic Houston Henry shall be substituted as attorneys for appellants. Attorney Robert E. Rader, Jr. is granted leave to withdraw as appellants' attorney.

It is further ordered that appellants' petition for rehearing filed in the captioned cause is denied.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

*United States District Judge of the District of Wyoming, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

JULY TERM — September 27, 1985

Before Honorable James E. Barrett, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Ewing T. Kerr, District Judge*

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

HACKNEY, INC. AND WAYNE SCHWEDLAND,
Defendants-Counterclaimants,
Appellants.

Nos. 84-1495
84-1568

This court has for consideration appellants' motion for stay of mandate pending petition for certiorari, and appellee's response stating that the appellee does not oppose appellants' motion.

It has further been represented to the court that the parties waive any requirement for a bond pending the filing of appellants' petition for certiorari.

Upon consideration whereof, the court orders the mandate in the captioned case stayed until November 21, 1985, pending certiorari. If, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellants have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

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*Of the United States District Court for the District of Wyoming, sitting by designation.

Further, no bond shall be required pending this stay.

HOWARD K. PHILLIPS, Clerk

/s/ ROBERT L. HOECKER

By Robert L. Hoecker
Chief Deputy Clerk

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-874

In the Supreme Court of the United States

OCTOBER TERM, 1985

HACKNEY, INC., AND WAYNE SCHWEDLAND, PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a magistrate's finding of probable cause justifying the issuance of an inspection warrant under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, may be challenged on the basis of evidence that was not before the magistrate, in the absence of a showing that the warrant application contained an intentional misstatement or omission or a misstatement or omission made in reckless disregard of the truth.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-874

HACKNEY, INC., AND WAYNE SCHWEDLAND, PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 769 F.2d 650. The opinion of the district court (Pet. App. B1-B10) is reported at 583 F. Supp. 773.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1985, and a petition for rehearing was denied on August 23, 1985 (Pet. App. D1). The petition for a writ of certiorari was filed on November 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 26, 1982, a compliance officer for the Occupational Safety and Health Administration (OSHA) attempted to conduct an inspection of the manufacturing plant operated by petitioner Hackney, Inc., located in Enid,

Oklahoma. The plant manager, petitioner Wayne Schwedland, refused to permit the inspection to take place. Pet. App. B1. The Secretary of Labor, through his agents, subsequently applied to a federal magistrate for an administrative search warrant authorizing an inspection of the plant (*id.* at A2, B1-B2). The application for the warrant contained the affidavit of an OSHA Supervisory Industrial Hygienist stating that the plant had been selected for inspection pursuant to a programmed health inspection plan providing for periodic inspections of places of employment; the affidavit explained that the purpose of the inspection was to determine whether the conditions at the plant complied with the Occupational Safety and Health Act and the regulations promulgated thereunder (*id.* at A2-A3, B8). The supporting materials attached to the affidavit included a copy of the OSHA programmed health inspection plan, documents describing the Standard Industrial Classification (SIC) code applicable to the plant, and a history of OSHA inspections of the Hackney plant (*id.* at A2-A4, B8-B9). The magistrate found that the Secretary had established administrative probable cause to inspect Hackney's premises and issued the warrant (*id.* at A2, B2). Plant manager Schwedland, however, again refused to permit OSHA agents to enter the plant (*ibid.*).

2. The Secretary instituted civil contempt proceedings in the United States District Court for the Western District of Oklahoma based upon petitioners' refusal to permit the inspection authorized by the warrant (Pet. App. A2, B2). Petitioners filed a counterclaim seeking a declaratory judgment that the warrant was not supported by probable cause and that OSHA's plan for selecting plants for health inspections was invalid (*ibid.*).[1] Petitioners sought discovery of information that was not presented to the magistrate

[1]Specifically, petitioners argued that the Secretary's inspection plan was unreasonable under the Fourth Amendment and discriminatory under the Fifth Amendment, and that the plan had been adopted in

in the warrant application in order to support their claims (*id.* at A5, B2). The Secretary contended that such discovery was improper because petitioners' challenge to the validity of the warrant could only be based upon the information before the magistrate who issued the warrant, absent a showing that the warrant application contained intentionally or recklessly false statements. The district court referred the discovery dispute to the magistrate, who denied petitioners' request for discovery, holding that discovery was available only to obtain evidence that was submitted in the warrant application. The district court affirmed the magistrate's order, but conditionally permitted petitioners to introduce at trial evidence that was not included in the warrant application. *Id.* at B3.

The district court held that the warrant was supported by probable cause, and that petitioners' refusal to permit the inspection to take place therefore constituted civil contempt of court (Pet. App. B1-B10). The court stated that "the traditional requirement that review of the [validity of a] warrant be confined to the 'four corners' of the [warrant] application is applicable to a review of administrative inspection warrants" (*id.* at B3). It observed that this Court in *Franks* v. *Delaware*, 438 U.S. 154 (1978), held in the criminal context that "review of a search warrant must be limited to examination of materials presented to the magistrate, in the absence of intentional or grossly negligent false statements made to the issuing magistrate" (Pet. App. B3), and concluded that the same rule should apply to administrative inspection warrants.

The district court noted that "administrative probable cause [can] be established by showing that the selected workplace had been chosen for the inspection on the basis

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violation of the requirements set forth in the Administrative Procedure Act. Pet. 5; Pet. App. B4.

of an administrative plan derived from neutral sources" (Pet. App. B3-B4). It held that the *Franks* rule barred petitioners from introducing extrinsic evidence to challenge the validity of the OSHA inspection selection plan described in the warrant "absent some indication of invalidity within the four corners of the warrant application" (Pet. App. B4). To hold otherwise, the court concluded, "would render the four corners requirement meaningless in review of inspection warrants" (*id.* at B5-B6 (footnote omitted)).

The court found that petitioner Hackney's Fourth Amendment protection against unreasonable searches was adequately protected "by reviewing the warrant on the same basis as did the magistrate, that basis being an assurance that OSHA's selection of Hackney for inspection was pursuant to a neutral plan. To provide further review would require the Court to set a higher standard than did the Supreme Court in [*Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978)], and, given an intrusion that is decidedly less substantial than most intrusions protected by fourth amendment jurisprudence, the Court is unwilling to do so" (Pet. App. B7).[2]

Considering the evidence presented to the magistrate in this case, the district court found that OSHA's health inspection plan constituted "a general administrative plan for the enforcement of OSHA regulations * * * derived

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[2]The district court also suggested, in dicta, that an employer could submit to an inspection and challenge the validity of the inspection selection plan in proceedings before the Occupational Safety and Health Review Commission relating to any citations issued as a result of the inspection (Pet. App. B5-B7). Although the Secretary has taken the position that review of the inspection selection plan in such proceedings is similarly limited to the information presented to the magistrate, that issue is not before this Court because the court of appeals expressly declined to decide whether petitioners have any "post-inspection rights" to challenge the validity of the plan (*id.* at A6 n.2).

from neutral sources" and concluded that the Hackney plant had been "selected [for inspection] pursuant to the plan" (Pet. App. B9). The court therefore upheld the validity of the warrant.[3]

3. The court of appeals unanimously affirmed (Pet. App. A1-A6). The court first held that the district court had correctly concluded that the warrant was supported by probable cause. Applying the standard established by this Court in *Marshall* v. *Barlow's, Inc., supra*, the court of appeals found that the warrant was supported by probable cause because "[the] Hackney [plant] was randomly selected for inspection pursuant to a neutral inspection plan" (Pet. App. A5).

The court of appeals rejected petitioners' claim that they should have been permitted to introduce evidence "outside the 'four corners' of the material submitted to the issuing federal magistrate" to demonstrate that the OSHA inspection plan was invalid (Pet. App. A5). The court stated that only the information before the issuing magistrate may be considered in assessing the validity of a warrant. It noted that this Court's opinion in *Marshall* v. *Barlow's, Inc., supra*, observed that inspection warrants could be "executed without delay and without prior notice" (436 U.S. at 316), and did not "envision[] the expanded evidentiary inquiry here sought by Hackney in its efforts to resist an inspection of its plant" (Pet. App. A5). The court of appeals concluded that there is "no reason to impose cumbersome discovery procedures on the enforcement of an OSHA inspection warrant" (*id.* at A6 (footnote omitted)).

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[3]The district court also rejected petitioners' contention that the warrant was overbroad because it allowed OSHA to use personal sampling devices in connection with the inspection (Pet. App. B9-B10).

ARGUMENT

Petitioners repeatedly misstate the issue presented in this case, claiming that the decision below "prevents any [judicial] inquiry whatsoever" concerning the Secretary's plan for scheduling workplace inspections. Pet. 16; see also *id.* at 8, 9. In fact, the courts below *did* review the inspection plan at issue here in the course of determining that the warrant was justified by probable cause. See Pet. App. A5 (court of appeals held that Hackney "was randomly selected for inspection pursuant to a neutral inspection plan"); *id.* at B9 (district court found that plan is "a general administrative plan for ~~the~~ enforcement of OSHA regulations" and that the "plan is derived from neutral sources").

The actual question presented in this case is whether petitioners' challenge to the magistrate's probable cause determination—which necessarily involves consideration of the validity of the inspection plan—should be limited to the facts that were before the magistrate who issued the search warrant. Petitioners contend that they should be permitted to challenge the plan on the basis of evidence that was not included in the affidavit attached to the application for the search warrant; but their position is squarely at odds with this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), holding that information outside the warrant application generally cannot be considered in determining whether the warrant was justified by probable cause. The court of appeals' determination that *Franks* precludes petitioners' claim is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court therefore is not warranted.

1. a. The Occupational Safety and Health Act authorizes the Secretary of Labor to "inspect and investigate" any place of employment within his jurisdiction in order to carry out the purposes of the Act (29 U.S.C. 657(a)). In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), this Court

held that the Fourth Amendment requires the Secretary to obtain a warrant before he may conduct a nonconsensual inspection. The Court emphasized, however, that "[p]robable cause in the criminal law sense" is not needed to justify the issuance of a warrant (436 U.S. at 320-321 (citation and footnotes omitted)):

> For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

The Court stated that the requirement of a warrant would curb the "unbridled discretion" of enforcement personnel (*id.* at 323) without "impos[ing] serious burdens on the inspection system or the courts" (*id.* at 316).

The Secretary conducts two types of inspections under the Occupational Safety and Health Act—inspections initiated based upon specific evidence of a violation and inspections pursuant to a general enforcement plan providing for periodic inspections of places of employment in order to detect violations of the statute (see *Barlow's*, 436 U.S. at 320-321). In the present case, the application for the warrant was based upon a general plan for "programmed" inspections under which OSHA focuses its limited enforcement resources on industries in which employees are subject

to a significant risk of adverse health effects (Attachment to Affidavit of James E. Brown III, supporting warrant application, consisting of OSHA Instruction CPL 2.25B and attachments).[4] The plan specifies the Standard Industrial Classification (SIC) code categories for businesses in which employees are subject to a high degree of health hazard because of the toxic substances found in the work environment. It then sets forth inspection priorities based on the magnitude of that health hazard.

The plan also contains the names and addresses of employers organized by SIC code. These "establishment lists," which are prepared by a private contractor, are used by regional OSHA offices as the basis for scheduling inspections. Each regional office may inspect establishments in the order that is most efficient, but, with limited exceptions, each establishment must be inspected before a new inspection cycle is begun. The Oklahoma Area Office—the office that obtained the warrant at issue here—inspected employers in the order in which they appeared on the list.

The courts below correctly determined (Pet. App. A3-A4, B8-B9) that the facts set forth in the warrant application here established probable cause because they showed that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (*Barlow's*, 436 U.S. at 321). The warrant application contained a detailed explanation of the selection plan, and was accompanied by a copy of the plan itself, the description of the SIC

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[4]At the time the warrant was issued in this case, inspections were covered by OSHA Instruction CPL 2.25B. Because OSHA instructions frequently are updated, however, that instruction has been superseded. The current instruction, CPL 2.45A, sets forth the same method for identifying and ranking high-hazard industries, but specifies a slightly different process for selecting particular establishments for inspection.

code applicable to petitioner Hackney's plant, a copy of the page of the establishment list containing petitioner Hackney's name, petitioner Hackney's inspection history, and a sworn statement that the plant had been selected pursuant to the criteria set forth in the plan. The courts of appeals repeatedly have found similar applications sufficient to satisfy the administrative probable cause requirement. See, *e.g.*, *Donovan* v. *Wollaston Alloys, Inc.*, 695 F.2d 1, 5 (1st Cir. 1982); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984, 988 (9th Cir. 1980); *Marshall* v. *Chromalloy American Corp.*, 589 F.2d 1335, 1342-1343 (7th Cir.), cert. denied, 444 U.S. 884 (1979).[5]

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[5]*Brock* v. *Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985), is not, as petitioners erroneously suggest (Pet. 14 n.34), to the contrary. In *Gretna*, the court concluded that while the Secretary had provided sufficient evidence that he had adopted a neutral plan, he had not adequately demonstrated "the methodology employed in selecting the actual business at issue" (769 F.2d at 1113). The court stated that the Secretary should have provided either the actual establishment list or a description of the selection process. In this case, the warrant application contained both the page from the establishment list identifying Hackney, and the thorough description of the selection procedure set forth in the inspection plan. Petitioners' assertion (Pet. 14 n.34) that *Gretna* requires the Secretary to furnish "facts in support of OSHA's choice of SIC code" is simply wrong. In fact, the Fifth Circuit refused to require factual justifications of this type: "It is not the function of the court to question the Secretary's underlying decision that a particular toxic substance is a threat to the health of workers or, for example, to second-guess the Secretary's interpretation of the scientific or medical evidence analyzed in the development of the plan" (769 F.2d at 1113).

Petitioners attempt to cast doubt on the reasonableness of the inspection at issue here by making a variety of assertions concerning the factual circumstances surrounding the inspection (see Pet. 5-6). It is noteworthy that the court of appeals specifically rejected the claim that Hackney had been singled out for an unusually large number of inspections (Pet. App. A4), and the district court expressed doubt concerning petitioners' claim that the plant had been placed in the wrong SIC code (*id.* at B8 n.6).

Petitioners' claim is that the sufficiency of the affidavit on its face is beside the point; they contend that the district court should have permitted them to challenge the validity of the Secretary's inspection plan on the basis of evidence that was not before the magistrate who issued the warrant. This Court considered a similar argument in *Franks* v. *Delaware, supra.* The issue in *Franks* was whether a defendant in a criminal proceeding could introduce evidence that was not considered by the magistrate who issued the search warrant in order to challenge the sufficiency of the showing of probable cause in the affidavit supporting the warrant. This Court stated that "[t]here is * * * a presumption of validity with respect to the affidavit supporting the search warrant" and held that the party challenging the validity of a warrant can go behind the facts set forth in the affidavit only if his claim is supported by "allegations of deliberate falsehood or of reckless disregard for the truth * * * accompanied by an offer of proof" (438 U.S. at 171).

The Court observed that several considerations weighed against permitting a party challenging a warrant to introduce evidence that was not considered by the magistrate who issued the warrant. For example, it noted that the Fourth Amendment interests of the party challenging the warrant were "protected by [the] requirement that applicants for a warrant submit a sworn affidavit and by the magistrate's independent determination of sufficiency based on the face of the affidavit" (438 U.S. at 166). In this connection it is relevant that "the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit supporting a warrant application" (*ibid.*). The Court found that these and other considerations favoring the exclusion of evidence that was not considered by the issuing magistrate are outweighed only where the party challenging the warrant can show that the affidavit supporting the warrant contains deliberate falsehoods or statements made in reckless disregard of the truth.

Petitioners do not dispute that the rule set forth in *Franks* would bar their challenge to the inspection plan if *Franks* were applied in this context. Indeed, the argument pressed by petitioners is indistinguishable from the claim considered by the Court in *Franks*. In both cases the party challenging the warrant sought to introduce evidence that was not before the issuing magistrate in order to challenge the magistrate's finding that the application for a warrant established probable cause.

Petitioners instead argue (Pet. 14-16) that *Franks* does not apply here because the warrant was issued pursuant to the Secretary's enforcement plan rather than on the basis of an allegation of the existence of a statutory violation. However, the courts of appeals have concluded that *Franks* applies in the present context. *Brock* v. *Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110, 1114 (5th Cir. 1985); *Marshall* v. *Milwaukee Boiler Manufacturing Co.*, 626 F.2d 1339, 1346 (7th Cir. 1980); Pet. App. A5-A6.

The considerations underlying *Franks*—including the interest in judicial economy and finality of magistrates' probable cause determinations—apply with equal force to justify a limit upon challenges to probable cause determinations based upon administrative inspection plans. Moreover, contrary to petitioners' assertions (Pet. 15), the Occupational Safety and Health Act explicitly contemplates that the Secretary will exercise his inspection power "without delay." 29 U.S.C. 657(a)(1); see *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369, 1372 (5th Cir. 1979). If employers such as Hackney are permitted to transform every warrant enforcement proceeding into a full-scale evidentiary hearing, complete with wide-reaching discovery far removed from the magistrate's narrow inquiry, employers could delay every OSHA inspection. Such extensive litigation over the inspection plan and selection process plainly is inconsistent with this Court's indication in *Barlow's* that the

resources required by the warrant enforcement process would not "exceed manageable proportions" (436 U.S. at 321).

In addition, the magistrate's review of the inspection plan in the context of a warrant application provides full protection for employers' Fourth Amendment interests. *Barlow's* held that the probable cause standard is satisfied if the affidavit shows that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (436 U.S. at 321). A magistrate presented with the enforcement plan and the reasons for the selection of the particular employer surely is equipped to determine whether the *Barlow's* test has been satisfied.[6]

Petitioners' assertion (Pet. 8) that this result "denies the Fourth Amendment rights of an estimated six million employers" thus is obviously incorrect. Employers' Fourth Amendment rights are protected because the magistrate must conclude that the *Barlow's* test has been satisfied before he issues a warrant. Moreover, as in the present case, the magistrate's determination is subject to review on the basis of the materials submitted with the warrant application. What petitioners seek is more extensive judicial review of a probable cause determination, but this Court concluded in *Franks* that the information supplied to the issuing magistrate provides the appropriate basis for assessing the propriety of the probable cause determination. For

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[6]Indeed, petitioners adopt (Pet. 12-13) as the appropriate analysis the test described by the court in *Brock* v. *Gretna Machine & Ironworks, Inc., supra*, and that court expressly stated that "[i]n determining the validity of the warrant we will look no further than the application itself * * * and any sworn testimony given in conjunction therewith" (769 F.2d at 1113). Petitioners thus recognize that the inspection plan is subject to appropriate scrutiny when the magistrate determines whether or not to issue the warrant.

these reasons, the court of appeals correctly held that petitioners may not go beyond the "four corners" of the warrant application in challenging the factual basis for the issuance of the warrant in this case.

b. Petitioners contend (Pet. 12-15) that the court of appeals' decision conflicts with the decision of the Fifth Circuit in *Brock* v. *Gretna Machine & Ironworks, Inc.*, *supra*, and the decision of the Virginia Supreme Court in *Mosher Steel-Virginia* v. *Teig*, 327 S.E.2d 87 (1985). Both claims are without merit. In *Gretna*, the Fifth Circuit found that the warrant application did not establish probable cause and dismissed the Secretary's complaint seeking a civil contempt order. With respect to the question presented here, the *Gretna* court reached the same conclusion as the court below, rejecting the employer's claim that it was entitled to conduct discovery in support of its counterclaim that the Secretary's health inspection plan was unreasonable under the Fourth Amendment. The court stated that it would not look beyond the evidence presented to the magistrate in reviewing the magistrate's probable cause determination, observing that "[t]he magistrate must decide whether to issue the warrant based on information provided by the application or in qualified conjunction with the application. Judicial review of the validity of the search warrant is based on that same evidence" (769 F.2d at 1114).

Mosher similarly does not conflict with the court of appeals' decision in this case. In *Mosher*, the Virginia Supreme Court considered a warrant issued pursuant to the Virginia Occupational Safety and Health Act, and concluded that the warrant application did not establish probable cause (327 S.E.2d at 94). The state court adopted a state law standard governing the type and quantum of information that a state agency must present in order to establish administrative probable cause (*id.* at 93). Although this state standard obviously is inapposite here,

most of the "specific facts" which the Virginia court would require the state agency to provide in a warrant application—*e.g.*, the criteria used to designate high hazard industries, the method by which establishment lists are compiled, a description of the selection process, and the employer's inspection history—were present in the instant case. In any event, *Mosher* concerns state law and cannot affect the requirements imposed by the federal statute.

Since the *Mosher* court held that the affidavits on their face did not satisfy the probable cause standard, its statement (327 S.E.2d at 92 (footnote omitted)) that an employer may "adduce[] evidence beyond the limits of the supporting affidavit" in challenging a warrant based on a general inspection plan is simply dictum. This is especially true because the court expressly declined to address a basic issue in this case—whether an employer may conduct discovery into the design and operation of the inspection plan (327 S.E.2d at 94). Finally, it is noteworthy that the court's dictum regarding the consideration of evidence not contained in the application for the warrant was preceded by a quotation from the Virginia Constitution's prohibition upon general warrants (see *id.* at 92); the court's conclusion therefore may rest upon its interpretation of the State Constitution rather than the Fourth Amendment. For these reasons, there is no conflict between the decision below and *Mosher* warranting review by this Court.

2. Petitioners also attempt to avoid the effect of *Franks* by dressing their challenge to the warrant in different procedural garb. First, they argue (Pet. 10-13) that because the Secretary intitiated this civil contempt action, they should be permitted to assert a counterclaim challenging the validity of the inspection plan. This "counterclaim" is nothing more than a different label for petitioners' challenge to the

sufficiency of the magistrate's probable cause determination. As we have discussed, the probable cause determination necessarily encompasses consideration of the validity of the inspection plan; the counterclaim is simply an effort to circumvent the limitations imposed by *Franks* upon review of the magistrate's determination. It is thus not surprising that the district court stated that it was "inclined to agree" with the magistrate's characterization of petitioners' counterclaim as "a 'fishing expedition' designed for the purpose of avoiding the four corners requirement" (Pet. App. B6 n.2).

Petitioners' assertion of the "counterclaim" cannot alter the standard applicable to review of the magistrate's probable cause determination.[7] *Franks* therefore applies to the declaratory judgment claim as well, precluding the consideration of information that was not before the magistrate when the probable cause decision was made.[8]

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[7]Petitioners note (Pet. 10) that the employer in *Barlow's* raised the unconstitutionality of OSHA's warrantless inspections in a counterclaim. In *Barlow's*, however, the employer challenged the constitutionality of the Act on its face and was not seeking to utilize discovery procedures to attack the validity of a warrant issued pursuant to a particular inspection plan.

[8]Petitioners assert (Pet. 11-13) that the court of appeals' refusal to recognize a declaratory judgment action permitting broad review of the OSHA inspection plan conflicts "in principle" with *Brock* v. *Gretna Machine & Ironworks, Inc., supra*. But *Gretna* did not indicate that *Franks* is inapplicable to such an action. On the contrary, even though the employer in *Gretna* had asserted such a counterclaim, the court expressly stated that "[j]udicial review of the validity of the search warrant is based on [the evidence in the application for the warrant]" (769 F.2d at 1114).

Petitioners also assert that *Mosher Steel-Virginia* v. *Teig, supra*, conflicts with the decision below. As we have noted, however, the state court's discussion regarding *Franks* is dictum and may not be based upon the federal Constitution. That decision therefore cannot be said to present a conflict with the decision in this case warranting review by this Court.

Second, petitioners assert (Pet. 9, 15), without citing any authority, that an employer has a "due process right" to utilize the discovery process set forth in the Federal Rules of Civil Procedure to challenge the OSHA inspection plan. This claim is another recasting of petitioners' challenge to the rule adopted by this Court in *Franks*. Just as a criminal defendant has no due process right to contest the factual allegations in a warrant application, petitioners have no such due process right in this context.[9]

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[9]Petitioners complain (Pet. 16 & n.38) that the court of appeals' decision renders its challenge to the constitutionality of the plan unreviewable. In fact, as we have discussed, the constitutionality of the plan is always reviewable in warrant enforcement proceedings—under the reasonableness standard articulated in *Barlow's* and subject to the evidentiary limitations imposed by *Franks*. Although the Secretary has maintained in other cases (see Pet. 16 n.38) that the *Franks* limitations apply in any type of proceedings in which an employer is challenging the plan, the court of appeals explicitly declined (Pet. App. A6 n.2) to decide if petitioners could obtain review of the inspection plan in post-inspection proceedings. That issue therefore is not presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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No. 85-874

In The

Supreme Court of the United States

OCTOBER TERM, 1985

HACKNEY, INC., AND WAYNE SCHWEDLAND

Petitioners,

v.

WILLIAM H. BROCK, Secretary of Labor,
United States Department of Labor,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Come now Petitioners, HACKNEY, INC. and WAYNE SCHWEDLAND, by and through their counsel of record, and file this, Reply to Brief for the Respondent in Opposition, and would respectfully show the Court as follows:

Improper Form of Respondent's Brief in Opposition

Petitioners would initially show the Court that Brief for the Respondent in Opposition fails to comply with Rule 22.5, United States Supreme Court Rules, in that it disregards Supreme Court Rule 33 concerning form of briefs. Brief for the Respondent in Opposition, as furnished to

Petitioners, is not printed, and fails to comply with Rules 33.1(b), (c) and (d) concerning size of print, duplication, and dimensions of pages and printed matter. The Supreme Court has ruled that the Clerk will be instructed not to accept for record or filing a document which fails to conform to the requirements of the Supreme Court Rules, unless the party files a motion to dispense with printing or other form requirements.[1] Respondent has also failed to include a Table of Contents and a Table of Authorities, as specifically required by Rule 33.5(a) and (b), for all documents which exceed three pages. For these reasons, Petitioners respectfully request the Court to not accept for record or filing Brief for the Respondent in Opposition.

Argument and Authorities

Several matters of substance in the Brief for the Respondent in Opposition require reply.

Respondent's wayward brief fails to recognize the language of the Fourth Amendment that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized."[2] The warrant packet submitted to the Magistrate in the instant case fails to pass this constitutional muster. The information submitted to the Magistrate, particularly the affidavit of James E. Brown, III, provided no basis for the determination by the courts below that probable cause existed. The affidavit contains no affirmative

[1]*See, Snider v. All State Administrators, Inc.*, 414 U.S. 685, 686, 39 L. Ed. 2d 90, 92, 94 S. Ct. 771 (1974).

[2]U. S. Constitution, Amendment IV.

allegation that the affiant spoke with personal knowledge of the matters contained in such affidavit, as required by *Giordenello v. United States.*[3] By applying the four corners doctrine set out in *Franks,* and accepting the validity of a warrant not based on personal knowledge, the courts below render Petitioner's Fourth Amendment rights meaningless. To rule that probable cause exists in light of such an affidavit, is to remove the Magistrate as guardian of Petitioners' Fourth Amendment rights and establish him as a rubber stamp in the administrative process.

Respondent, in an effort to diminish a conflict between the instant cause and *Mosher Steel-Virginia v. Eva S. Teig, Commissioner of Labor,* 327 S. E. 2d 87, 12 BNA OSHC 1217 (Va. 1985), mischaracterizes the principal holding in the latter case as "dictum."[4] The exact holding of the Virginia Supreme Court reads as follows:

> "We hold that an employer need not make a *Franks* showing to contest the validity of a warrant and its underlying plan for a general inspection by adducing evidence beyond the limits of the supporting affidavit. An employer who challenges the plan on which the general inspection warrant is based is entitled to seek a pre-search declaratory judgment to determine the constitutional validity of the plan. We acknowledge that this holding may result in frustrating delays in the

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[3]Respondent repeatedly argues for use of an admittedly criminal standard that limits review of the warrant packet to the four corners of the affidavit as set out in *Franks v. Delaware,* 438 U. S. 154. Respondent, however, fails to acknowledge the application of other Fourth Amendment principles which have arisen in criminal cases. Foremost among these is that any warrant must contain an affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein. *Giordenello v. United States,* 357 U. S. 480, 486 (1958).

[4]Brief for the Respondent in Opposition (hereinafter "Resp.__") pp. 12-13.

> enforcement of Occupational Safety & Health laws, but the constitutional principle at stake is of overriding importance."[5] [Citations and footnote omitted]

The conflict between the two cases and the language of the Virginia Supreme Court could not be clearer.

Respondent further incorrectly asserts that the "argument pressed by Petitioners [herein] is indistinguishable from the claim considered by the Court in *Franks*."[6] The arguments in the two cases are clearly distinguishable. *Franks* presented a post-search challenge to a *criminal* warrant, with the holding of that case narrowly confined to a "criminal proceeding."[7]

The instant case involves a declaratory judgment action under 28 U.S.C. Section 2201 that goes *beyond* the warrant and challenges OSHA's entire administrative inspection plan. The instant case involves a pre-search challenge of both the warrant issued, and the administrative plan allegedly being followed.

The decision of the Appeals Court to embrace the application of *Franks* in this setting prevents, rather than permits, the vigorous inquiry required to determine the accuracy of the factual affidavit supporting a warrant application. Applying *Franks* in this context prevents any real judicial inquiry whatsoever into the Secretary's plan and makes the Magistrate nothing more than a rubber stamp for an OSHA affiant's boilerplate affidavit. When, as here, the affidavit is not sworn on personal knowledge, the application of *Franks* prevents an employer from determining what *facts*, if any, are within the personal knowledge of the affiant, and are true and correct. Unlike the traditional warrant, which

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[5]327 S. E. 2d 87 (Va. 1985).

[6]Resp. p. 10

[7]*Franks v. Delaware*, 438 U. S. at 155.

is based on specific evidence, the inspection warrant contemplated by the Respondent provides no protection against the search itself for an employer, like Hackney, who the government has no historical probable cause basis to suspect is violating the OSHA regulations.

Application of *Franks*, in a non-criminal environment, to a warrant based on an inspection plan rather than a specific complaint, renders the warrant requirement set out in *Barlow's* meaningless. It prevents the regulated employer from ever determining through the adversary process how a given administrative plan is created, and how it is applied to the employer. By foreclosing inquiry beyond the scope of *Franks*, and by permitting affidavits by OSHA affiants to be "sworn" without personal knowledge, an employer's Fourth Amendment rights are sacrificed at the altar of administrative expediency. It is just such a warrant that the Framers feared,[8] and which the dissent of Justice Stevens anticipated in *Barlow's*.[9]

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[8]*See*, T. Taylor, Two Studies in Constitutional Interpretation, 41 (1967);

[9]*Marshall v. Barlow's, Inc.*, 436 U. S. 307, 327-28 (1978).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray the Writ of Certiorari be granted and that the parties be directed to brief and argue the questions presented in the Petition.

Respectfully submitted,

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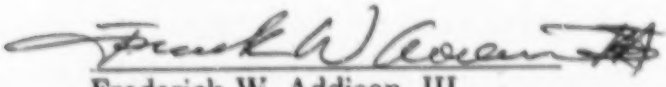

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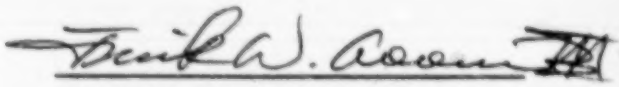
CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1986, three copies of this Reply Brief of Petitioners were placed in the United States Mail, certified, return receipt requested, postage prepaid, to counsel for all parties required to be served, said parties being Charles Fried, the Solicitor General, Department of Justice, Washington, D.C. 20530, and one copy to Andrea Casson, U. S. Department of Labor, Room S 4004, Washington, D.C. 20210.



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